

APPEAL NO. 010394

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on January 24, 2001. The hearing officer held that the respondent (claimant) was entitled to supplemental income benefits for his sixth quarter of eligibility. He found that the claimant made a good faith search for employment commensurate with his ability to work. He further found that the claimant "has" returned to work earning less than 80% of his average weekly wage (AWW).

The appellant (carrier) appeals and notes that there was no evidence that the claimant searched for employment every week of his qualifying period. The carrier also states that the finding as to the claimant having returned to work earning less than 80% of his AWW is without foundation in the evidence. Finally, the carrier asserts that the hearing officer erred in *sua sponte* admitting a document as one of his own exhibits that was excluded for failure of timely exchange. The claimant does not respond.

DECISION

Reversed and remanded for reconstruction of the record and reconsideration in light of an apparently erroneous stipulation.

After the claimant testified as the first witness, the hearing officer went off the record while the second witness was called. The tape did not resume after this. We remand so that the last part of the record may be reconstructed.

Because the case is being remanded and no further remands may be allowed, we note that the decision includes an erroneous stipulation as to the dates of the qualifying period which is critical in analyzing whether a search for employment was made in every week of the qualifying period as required by Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(e) (Rule 130.102(e)). The dates in the stipulation were August 22 through November 21, 2000, but this would yield 13 weeks and one day as the qualifying period. According to the definition set forth in Rule 130.101(4), the period actually ran from August 23 through November 21, 2000. In order to correctly assess compliance with the rule, it is important that the weeks be accurately determined by the hearing officer (the first week, for example, would run from August 23 through 29, which would be a seven-day period inclusive of the beginning and ending periods for that week).

Finally, the record after remand should include some explanation as to why a document excluded for failure to timely exchange was made a hearing officer's exhibit. As it stands, we cannot tell if it was intended as an appellate exhibit or actually readmitted into evidence for consideration on the merits.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order

by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202. See Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Philip F. O'Neill
Appeals Judge